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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted].

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, APPELLANT,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON, AND PHILLIPS INVESTMENT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANT ON MOTION TO DISMISS.

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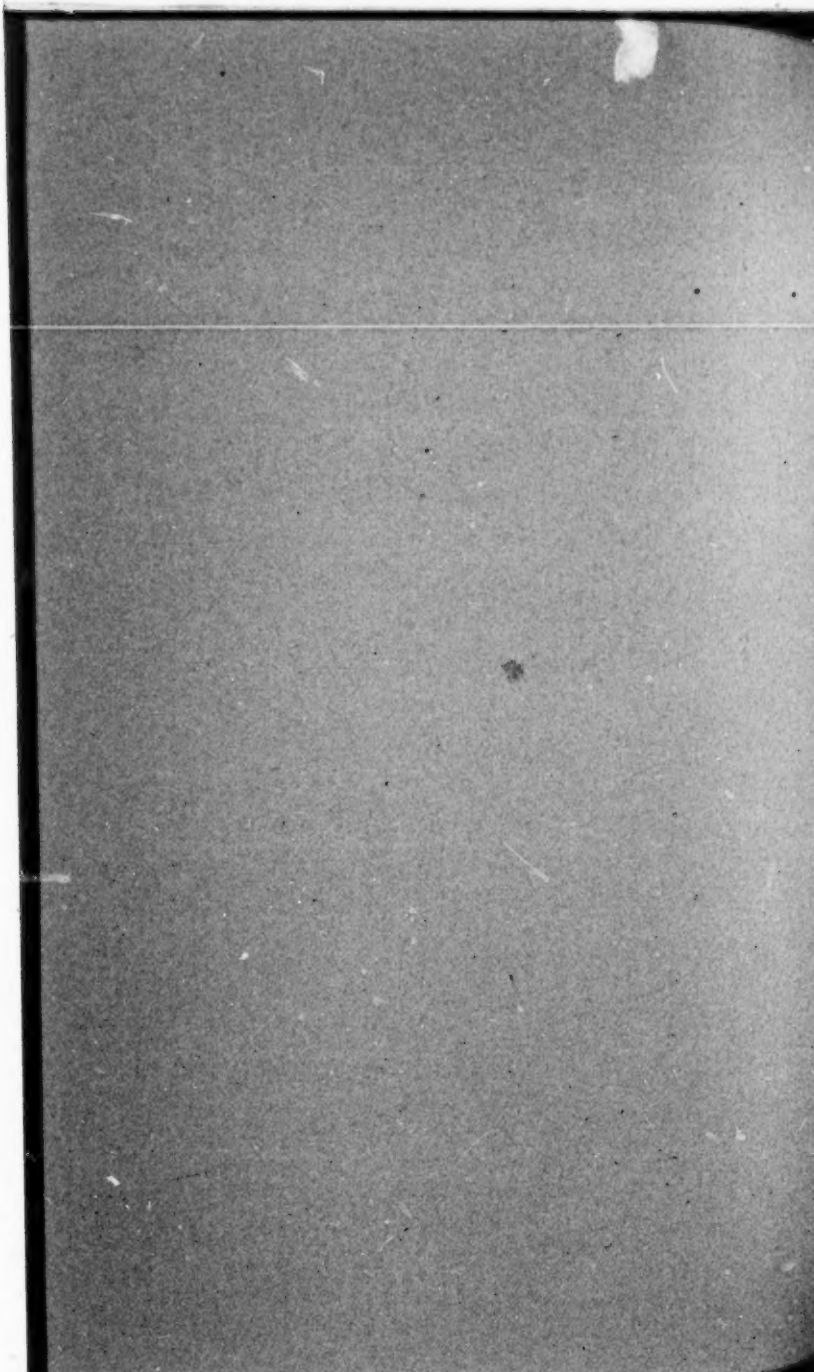
(19,771.)



SUPREME COURT OF THE UNITED STATES.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY
v.
WILLIAM H. CLARK ET AL.

19,771.
October Term, 1905.
No. 270.

BRIEF FOR APPELLANT ON MOTION TO DISMISS.

As the appellant's direct appeal to this court is based solely upon the provisions of the fourth clause of section 5 of the judiciary act of 1891, we shall not follow counsel for the appellees in their consideration of other matters, but shall inquire (1) whether this case comes within the scope of that clause, and (2) whether, if it does, there is any extraneous reason preventing the application thereof to the appeal.

1.

This is a suit in equity, brought in the circuit court for the northern district of Texas, by a citizen of Pennsylvania against citizens of Texas, Ohio and Missouri, for the purpose of restraining the use of a judgment at law theretofore obtained in said court by means of fraud, and recovering about $24,000 paid under the judgment. The jurisdiction of the circuit court was claimed (1) because the requisite diversity of citizenship existed and (2) because the suit was ancillary to the original action at law. The plaintiff's bill did not disclose the existence of a federal question. All of the defendants who now are appellees in this court claimed by demurrer, and one of them claimed also by answer, that

the court was deprived of power to entertain the bill by the provisions of the last clause of the seventh amendment to the constitution, reading as follows: "And no fact tried by a jury shall be otherwise re-examined by any court of the United States than according to the rules of the common law." The appellees insisted upon this objection in the court below and are doing so here, pages 51 to 61 of their brief being devoted to its discussion. The decision of the district judge upon the constitutional question was in favor of the appellant; but his decision upon the case as a whole was adverse to the appellant, in so far as its claim against the appellees was concerned.

Section 5 of the act of 1891 provides that an appeal may be taken from the circuit court direct to this court "in any case that involves the construction or application of the Constitution of the United States." The clause could not have been framed more broadly; and if it is to be construed in accordance with the natural import of the language employed, it is quite obvious that the present case falls within its bounds, for undoubtedly this is a case that involves both the construction and the application of the constitution. In every case that has arisen heretofore, this court has given full effect to the sweeping terms found alike in the fourth, fifth and sixth clauses of section 5.

It has been held repeatedly that the whole case, and not merely the constitutional question, comes here for review, even though that question affect only a small part of the recovery sought: Field v. Barber Asphalt Co., 194 U. S. 618, and cases there cited; Iowa Life Insurance Co. v. Lewis, 187 U. S. 335. It makes no difference which party injects the constitutional question into the dispute, nor is it essential that its presence appear upon the face of the pleadings; it is sufficient that it be really and substantially involved in the case, no matter how or at what stage of the proceedings it gets there. For instance, in Loeb v. Trustees of Columbia Township, 179 U. S. 472, it was raised by a general demurrer to the plaintiff's petition, one of the grounds of the de-

murrer being that a state statute relied upon by the plaintiff contravened the due process of law clause of the fourteenth amendment.

It is of no importance whether the right claimed under the constitution be granted or denied. In Iowa Life Insurance Co. v. Lewis, it was denied, and the party claiming it brought the case up. In Loeb v. Trustees of Columbia Township, it was granted, and the party against whom it was claimed brought the case up. In Holder v. Aultman, 169 U. S. 81, there was a writ of error direct to this court because of the claim made in the circuit court that a certain Michigan statute was violative of the constitution. Mr. Justice Gray said: "Upon such a writ of error, differing in these respects from a writ of error to the highest court of a state, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case." The decision of the circuit court was based partly, and that of this court was based wholly, upon reasons that were independent of the constitutional question.

It is contended that the existence of the constitutional question furnishes no ground for a direct appeal to this court upon the part of the appellant, because the determination of that question in the court below was in its favor. The decree was in favor of the appellees, and they had no occasion to appeal; but if upon the other issues of law the district judge had adhered to the opinions entertained by him when he overruled the demurrers, it would have been against the appellees. Certainly they would have had the right then to invoke the jurisdiction of this court. Now, there is nothing in the act to indicate that Congress intended to make the jurisdiction of this court depend upon the question whether the circuit court decided all issues of law, or any particular issue of law, in favor of the appellees. It cannot be that if one party is defeated in a suit the appeal shall be to

this court, and if the other party is defeated the appeal shall be to the court at New Orleans. The constitutional question was involved in the case in the court below, and is involved in it here. The appellees will have the full benefit of their contention on that subject, just as they would have had if the district judge had decided it in their favor (in which event the situation would have been precisely as it was in Loeb v. Trustees of Columbia Township), or if the final decree had been against them and they were appealing. It was the manifest purpose of Congress that in all such cases the party who had to do the appealing should be at liberty to come here with his record. We think the reasoning of Mr. Justice Harlan in the Loeb case is pertinent to the matter now under consideration. The italics in the following quotation from his opinion are ours.

"The circuit court of appeals act does not declare that the final judgment in a circuit court in a case in which there was a claim of the repugnancy of a state statute to the Constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is made in the circuit court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, *and that claim is sustained or rejected*, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment *at the instance of the unsuccessful party whether plaintiff or defendant*. It was the purpose of Congress to give opportunity to *an unsuccessful litigant* to come to this court directly from the circuit court *in every case* in which a claim is made that a state law is in contravention of the Constitution of the United States. If the circuit court had adjudged in this case that the township's claim of unconstitutionality was without merit and had given judgment for the plaintiff, can it be doubted for a moment that the township could have brought the case here directly from the circuit court upon writ of error? But if the township, upon a denial of its claim, could invoke our jurisdiction, as of right, upon what principle can the plaintiff be denied the like privilege if the state law upon which his action depended was, upon his adversary's claim, stricken

down as void under the Constitution of the United States? *Can the case, so far as the township is concerned, be regarded as belonging to the class which the act of Congress brings directly within the cognizance of this court, and yet not be regarded as a case of that class with respect to the plaintiff?* The answer to these questions has already been indicated."

We think, however, that in Field v. Barber Asphalt Co., 194 U. S. 618, the question now under consideration was determined. In that case, Field brought a suit in equity against the asphalt company, to have declared void certain tax bills issued against his property. He urged several objections to the tax bills, some of which were based upon constitutional grounds, and some not. The circuit court held against him on the federal questions, but for other reasons granted a portion of the relief for which he had prayed. The decree therefore was not satisfactory in all things to either party; and both appealed to this court. Field moved to dismiss the appeal of the asphalt company, upon the ground that its appeal should have gone to the circuit court of appeals because the decision of the constitutional questions had been favorable to it, and it could not found the right of a direct appeal to this court upon the determination of a constitutional question in its own favor. This is precisely the position taken by the appellees in the case at bar. The motion was denied. After citing several cases to the effect that in a direct appeal because of the existence of a constitutional question the whole case comes up, Mr. Justice Day said:

"If, therefore, the whole case can come to this court by direct appeal under the allegations of this bill, and if all the questions, federal or otherwise, may come up on such appeal, it must follow that either party aggrieved by the decision may appeal, and in this case the complainant appealing, a cross appeal may be sued out by the defendant as to the matters decided in the same case against him. If he fails to take such appeal the correctness of the decision as against him will be presumed."

In one of their arguments on the motion (page 16 of the argument in the yellow cover), the appellees say:

"Another ground exists for denying that the federal question is involved, if the construction of the seventh amendment is, as appellant contends for in its brief on the merits herein. It urges in its brief, that the seventh amendment applies solely to appellate courts and not to the power of the circuit courts, and says that the question has been a settled one in this court for almost a century. Appellant's brief, p. 68 et seq. Crim v. Handley, 94 U. S. 652. If this court has settled the question, or if the provision itself is clearly applicable to appellate procedure, then in no true sense was the constitution involved when appellees raised the point below. We do not agree with appellant, that the question of jurisdiction suggested by the application of the seventh amendment is a settled question; but if it is settled then it is not a question."

In other words, the appellees appear to make the somewhat startling suggestion that the constitutional question which they urged with so great a show of confidence in the court below, and to which they devote several pages of their brief in this court, and concerning which they assume that this court will adopt their contention (Brief, 55), is a frivolous question, and therefore cannot serve as the basis of jurisdiction for a direct appeal. We do not believe that the appellees can be heard to say that the question which they themselves are pressing upon the attention of the court is frivolous; they are estopped from assuming such a position. But a question of jurisdiction is one which the court raises for itself, without awaiting the movement of parties litigant; and we suppose that the solution of the inquiry whether a certain proposition should be deemed frivolous in this connection, would depend to some extent upon the good or bad faith of the person advancing it. Therefore we may be permitted to say that the appellees mistake in thinking that we claim that the field of operation of the seventh amendment is confined to the appellate courts, and that we assert that the question now raised has been a settled one in this

court for almost a century. We do not make either of these contentions, or believe in the correctness of either of them. We think that the appellees are wrong in their opinion that the federal courts have not the same power as other courts of chancery to review judgments at law for fraud practiced in their procurement. But we do not think that the question is a frivolous one, and we do not believe that the appellees have acted otherwise than in good faith in presenting it for decision. The attention given to it by both parties demonstrates that they have regarded it as a real question; and as such we have no doubt the court will treat it, in so far as its bearing upon the matter of jurisdiction is concerned.

2.

It remains to inquire whether, assuming that the present case is within the terms of the fourth clause of section 5 of the act of 1891, there is any extraneous reason why that clause should not be controlling.

It is contended for the appellees that the constitutional question involved in this litigation is also a jurisdictional question, and that therefore the effect of its presence is measured solely by the first clause of section 5. That clause permits a direct appeal to this court "in any case in which the jurisdiction of the court is in issue," and provides that "in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision." Our answer to this proposition is short.

If, as we have endeavored to show, the case comes fairly within the provisions of the fourth clause, and if, as counsel for the appellees claim, it comes within those of the first clause, we perceive no reason why the appellant should not have the right to elect under which clause it would proceed. Certainly it is the general rule that whenever by statute, contract, or otherwise, a person comes into the possession of two rights which cannot be enjoyed concurrently, it is his

privilege to choose between them. The application of this principle to the selection of tribunals is a thing of daily occurrence. If a citizen of New York wishes to sue a citizen of Pennsylvania for $5,000, he may file his complaint in either the state court or the federal; and it is for him, and not for the defendant, to pick the court. If a defendant in a circuit or district court deny the jurisdiction of the court, and, his contention on that subject having been overruled, he be defeated upon the merits of the case, it will be for him, and not for the appellee, to say whether he will abandon everything except the jurisdictional question and bring that directly here, or will take his entire case to the circuit court of appeals.

We cannot find anything in the act of 1891 which indicates an intention that the first clause of section 5 should be superior to the fourth clause, and should exclude the application of the latter to cases falling within the terms of both. They appear to be coördinate clauses, whose fields of operation overlap in spots though separate in the main. The questions which may be raised in regard to the jurisdiction of a court are multitudinous, and few of them involve the construction or application of the constitution. Whether there has been due service of process, whether the defendant is suable in the district in which the action was brought, whether there is diversity of citizenship, whether the amount in controversy is sufficient, whether the cause of action is separable,—these and a hundred other subjects not affected by any constitutional provision may come into dispute as questions of jurisdiction. Ordinarily such inquiries are of a purely preliminary nature, and require for their proper answering no investigation into the merits of a cause. For this reason, no doubt, it was provided that in such cases only the jurisdictional question should be certified to this court. But as a general rule, constitutional questions are of deeper import, and cannot be disposed of without considering the whole case. Therefore it was enacted that whenever such

a question was involved this court should have, and should pass upon, the entire record. The present case is of that character; the constitutional question permeates the whole controversy. The seventh amendment must be construed, and as construed the extent of its application to the case must be determined by an examination of all the record.

This leads us to another suggestion. Thus far, we have considered the matter as if the constitutional question here involved were strictly one of jurisdiction; and in our original brief we spoke of it as such, having then no occasion to draw any distinctions with reference to it. But is it really so? The inhibition against re-examining facts tried by a jury must of necessity have some limit. Is the verdict of the jury to the effect that Hunter died in 1896 to be taken as settling that question irretrievably for every litigation between the parties and privies, wherein it may constitute a collateral issue? Even if the circuit court sitting in equity were forbidden to re-examine that question as a main and fundamental issue, and to hold that the policies of insurance never became matured demands against the company, would it follow of necessity that it could not take cognizance of the indubitable fact that Hunter still lives, as a mere link in the chain of proof that the judgment was obtained by fraud? It seems to us that it would not. If not, then the constitutional question is not one of primary jurisdiction, but one of the extent to which the court will go in granting relief. While we do not think that such a solution of the problem would be correct, it appears to us conceivable that the seventh amendment might be construed in such manner, and be applied in such manner to the facts of this case, that the court would restrain the use of the judgment at law as a defense because of the fraud practiced in its procurement, and then remit the appellant to the various state courts for the recovery of its money by actions for money had and received. If such might be the result, the question presented by the appellees is not one naturally and properly covered by the

first clause of section 5. Much less is it one which must be determined under the provisions of that clause to the exclusion of another of at least equal dignity, which appears undoubtedly to be applicable to the situation.

Respectfully submitted,

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Counsel for Appellant.

APRIL 26, 1906.